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November 22, 2004

Honorable James J. Jochum
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit
Room 1870
14th St. & Constitution Avenue, N.W.
Washington, DC 20230

Response to Request for Comments
69 Fed. Reg. 56738 (9/22/04)
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Re: Certification of Factual Information – Request for Comments

Attention: Ms. Elizabeth C. Seastrum, Senior Counsel and Mr. Philip J. Curtin,
Attorney-Advisor

Dear Mr. Jochum:

Below please find the comments of Stewart and Stewart regarding the Department's proposed regulation on the certification of factual information submitted in antidumping and countervailing duty proceedings. *See* 69 Fed. Reg. 56738 (Sept. 22, 2004).

Generally, we support the proposed modifications, particularly with respect to the Company Certification. By adding specific content to the Company Certification, Commerce may expect to increase accountability and improve the accuracy of the factual data collected.

We continue to be concerned, however, about the proposed modification of the Representative Certification. Commerce proposes to add language requiring that the attorney perform a "an inquiry reasonable under the circumstances." 69 Fed. Reg. at 56741, col. 1. Commerce explains as follows: "The Department would expect that attorneys perform due diligence on factual submissions in AC/CVD submissions in the same manner that they



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would perform due diligence on any other factual submission to which they are certifying as to its completeness and accuracy.” 69 Fed. Reg. at 56739, col. 3.

The language used by Commerce mirrors the language found in Rule 11(b) of the Court of International Trade, which likewise refers to an “inquiry reasonable under the circumstances”. Rule 11, however, specifically enumerates the scope of the attorney’s affirmation. With respect to factual allegations, for instance, the attorney affirms that such allegations “have evidentiary support” or, if so identified, are “likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.” USCIT Rule 11(b)(3).

In contrast to Rule 11, however, the scope of a reasonable inquiry requirement in the Representative Certification is unclear, particularly in light of the fact that Commerce also requires a detailed Company Certification. The Company Certification requires that the person with the responsibility for the preparation of the data certify the data’s completeness and accuracy. It also requires that *if* such certification is signed by an official with supervisory responsibility, that the certification list the “other individuals with significant responsibility for preparation of part or all of the submission.” 69 Fed. Reg. at 56740, col. 3. Such a detailed certification by the party in possession of the information would appear to provide *prima facie* support for an affirmation by the attorney that the factual information provided has “evidentiary support”, as required per Rule 11(b).

Seen in this light, the requirement of “an inquiry reasonable under the circumstances” on the part of the attorney in a Commerce proceeding would not appear to add anything, as it is already satisfied by the presence of the company’s own detailed certification(s). Having

borrowed selected language of the Court's rule, however, Commerce has not explained whether it also adopts the Rule's definition of the scope of the attorney's affirmation. And if Commerce's requirement differs, it has not explained how. Nor has Commerce explained how the attorney's certification is affected by the Company's certification.

These difficulties are neither trivial nor theoretical. Language barriers, as well as difficulties arising from differing legal and cultural environments, necessarily reduce the ability of the U.S. attorney to *independently* verify data which the respondent company officials certified as accurate and complete. Further, depending on the financial resources made available by the client, an attorney in AD/CVD investigation will necessarily bring different levels of independent resources to the client's representation. Either lack of clarity as to the attorney's specific duties or a requirement for a significant independent inquiry is likely to reduce smaller companies' access to representation. *See*, The Uruguay Round Agreements Act, Statement of Administrative Action, H. Rep. 103-316, Vol. 1, at 865 (referring to concern for the difficulties of small companies).

In light of these difficulties, we propose that Commerce remove the reference to an attorney's separate duty of inquiry. Alternatively, Commerce should explain, with specificity, the scope of that duty.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Terence P. Stewart", with a stylized flourish at the end.

Terence P. Stewart
Wesley K. Caine
William A. Fennell
Geert De Prest